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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 151.

GEORGE S. LATIMER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED OCTOBER 21, 1909.

(21,875.)

(21,875.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 151.

GEORGE S. LATIMER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1911.

1 In the District Court of the United States for Porto Rico, Sitting at San Juan.

(Filed July 8, 1909.)

GEORGE S. LATIMER, Plaintiff,
vs.
UNITED STATES, Defendant.

Appeal from Board of General Appraisers.

Bond.

By these presents George S. Latimer, as principal and the Fidelity and Deposit Company of Maryland as surety do hereby jointly and severally undertake, pursuant to the Act of June 10th, 1890, relative to appeals from the Board of General Appraisers, that if it should be held by the Court that the appeal in the above entitled case has been wrongfully taken, then the said plaintiff will pay to the defendant the costs and damages which it may have sustained by the wrongful taking of the said appeal in the above entitled case, not exceeding the sum of ($250.00) Two Hundred and Fifty Dollars, for the faithful performance of which we hereby bind ourselves, our heirs, successors, administrators and assigns.

Signed and sealed this 8th day of July, 1909.

GEO. S. LATIMER.
FIDELITY AND DEPOSIT CO. OF MD.,
By F. M. WELTY, *Agent and Attorney-in-fact.*

H. L. COCHRAN.

Approved as to substance and form 7/8/09 & ordered accepted and filed.

B. S. RODEY, *Judge.*

2 ISLAND OF PORTO RICO,
City of San Juan, ss:

I, Frank W. Welty, do solemnly swear that I am a resident of San Juan, Porto Rico and the duly authorized agent of the Fidelity and Deposit Company of Maryland, and that the said Company is possessed of assets over and above its just debts in the sum of two hundred and fifty dollars.

F. M. WELTY.

Subscribed and sworn to before me by Frank W. Welty personally known to me this 8th day of July, 1909.

ANDRÉS B. CROSAS,
[NOTARY'S SEAL.] *Notary Public.*

Reg'd at number 265.

1—151

3 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a Stated Term of the District Court of the United States for Porto Rico, within and for the District Aforesaid, Begun and Held at the Court-rooms of said Court, in the City of San Juan, on the Second Monday in April, Being the Twelfth Day of that Month, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States of America the One Hundred and Thirty-third.

Present: The Hon. Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a judgment in the following cause, to wit:

GEORGE S. LATIMER, Appellant,
vs.
THE UNITED STATES, Appellee.

Be it remembered that heretofore, to wit, on the second day of July, A. D. 1909, came the Appellant by his counsel and filed his Petition for Review in this cause, which said Petition is as follows, to wit:

GEORGE S. LATIMER, Appellant,
against
THE UNITED STATES, Appellee.

Order.

Upon reading and filing the annexed petition, and on motion of Hatch & Clute, Attorneys for the Petitioner, it is

Ordered, That the Board of United States General Appraisers, sitting at the Port of New York, return to this Court the record and the evidence taken by them in the matters referred to in the annexed petition and Schedule, together with a certified statement of the facts involved, and their decision thereon.

4 (Signed) B. S. RODEY,
United States Judge.

GEORGE S. LATIMER, Appellant,
against
THE UNITED STATES, Appellee.

Petition.

To the United States District Court for the District of Porto Rico:

Your petitioner, having complied with the Statutes in such case made and provided, is dissatisfied with the decisions of the Board of United States General Appraisers, in the matters which arose

within the district of this court, referred to in the Schedule below, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification.

The following is a concise statement of Errors of Law and Fact complained of:

Errors of Fact.

The Board of United States General Appraisers erred in not finding as a fact upon the record forwarded by the Collector of Customs for the Port of San Juan that the merchandise in question was "waste."

Errors of Law.

The said Board erred in not holding that the said merchandise is more specifically and more appropriately described and provided for under paragraph 463 of the Tariff Act of July 24, 1897, as "waste" not specially provided for, than under paragraph 215 of said Act as "all other tobacco, manufactured, or unmanufactured, not specially provided for."

The said Board erred in not holding that the Congress of the United States intended in said Act that the waste of any and all materials not otherwise specifically provided for as waste, such as wool waste in paragraphs 361 and 362 of said Act, and cotton waste in paragraph 537 of said Act, should be classifiable and pay duty under said paragraph 463, and not under any of the paragraphs of said Act, providing for the generic substances or materials from which said waste is produced.

The said Board erred in not sustaining the protest of the importer, and reversing the decision of the Collector.

The following is a description of the importations made by your petitioner which are the subject matter of said decisions, and of this petition, namely:

Schedule.

Description of merchandise.	Vessel.	Date of entry.	Number of protest.	Date of decision.
Waste tobacco	Julia...	M'ch 16, 1909	357747 / 305	June 9, 1909

Wherefore, your petitioner prays that this Court review the questions of law and fact involved in said decisions concerning the classification and rates of duty assessed upon the said merchandise, and that an order may be entered requiring the said Board to return to this Court the record and evidence taken by them, together with a certified statement of facts involved in the case, and their decisions

thereon; and your petitioner prays for such other or further relief as to the Court may seem just.

Dated San Juan, June 17, 1909.

(Signed) GEORGE S. LATIMER,
Petitioner.
By HATCH & CLUTE.

Hatch & Clute, Attorneys for Petitioner, No. 100 Broadway, Borough of Manhattan, New York City.

6 Return of Record by Board of United States Appraisers.

(Filed July 22, 1909.)

Return of the Board of United States General Appraisers to the Order of the Court.

United States District Court, District of Porto Rico.

Suit 2076. (650. Eq.)

GEORGE S. LATIMER
v.
UNITED STATES.

On Application for Review of a Decision of the Board of United States General Appraisers.

NEW YORK, —— —, —.

In response to the order of the court, said Board hereby returns, as given below, the records in the above-entitled matter, and certifies that a complete statement of the facts involved in the case, together with the decision of the Board, is embraced therein, and that no other facts were ascertained by said Board than such as are thus shown.

Specifically, the return comprises:

1. The importer's protest 357747, with the reports of the collector of customs thereon.

2. A copy of the Board's decision.

3. A copy of a prior decision of the Board upon a similar case. G. A. 6763 (T. D. 29027).

(Signed) I. F. FISCHER,
R. H. CHAMBERLAIN,
Board of United States General Appraisers.

Protest 357,747.

305.

SAN JUAN, P. R., *March 20th*, 1909.

To the Honorable Collector of Customs, Port of San Juan, P'to Rico:

Please take notice that we protest against your decision
7 as to the rate and amount of duties to be paid on one Bale Scrap tobacco, marked and numbered G. S. L. San Juan P'to Rico imported per Span. S/S Julia from Havana entered by me March 17th, 1909, for consumption entry No. 3392 liquidated March 19th 1909 and claim, as reasons for our objections thereto:

That the said merchandise is more specifically provided for, and more appropriately classifiable under paragraph 463 of the Tariff Act of July 24th, 1897, at ten per cent ad valorem as "waste," not special-y provided for," rather than under paragraph 215 of said Act, "as "tobacco, unmanufactured, not specially provided for," as assessed.

We pay the amount exacted under compulsion, solely to get the goods, reserving all rights.

(S'g'd) GEO. S. LATIMER,
By HATCH & CLUTE,
Attorneys for Importers.

100 Broadway, New York City.

Custom House, San Juan, P. R. Received Mar. 20, 1909, 10 A. M. D. E. Richardson, Coll.

United States Customs Service, Port of San Juan, P. R.

MARCH 30, 1909.

The Board of U. S. General Appraisers, 641 Washington Street, New York, N. Y.

GENTLEMEN: I submit herewith the protest of Geo. S. Latimer, by Hatch & Clute, Attorneys, 100 Broadway, New York, No. 305, against the assessment of duty as made by this office on a certain bale of tobacco imported per Cuban Str. "Julia," March 16, 1909.

Before returning said merchandise, it being understood by this office that the importation was a test one, experts of the Porto Rican
American Tobacco Co. were summoned, who stated that the
8 article under discussion was without doubt warehouse or storehouse scrap or sweepings, which is even a lower grade of tobacco than factory or table scrap. They stated, however, that after cleaning it could be utilized to make a cheap grade of stogies or cigarettes, in accordance with which latter statement par. 215 "All other tobacco, manufactured or unmanufactured, not specially provided for," seems to cover the case more specifically than par. 463, "waste," not specially provided for."

Respectfully,
(S'g'd) D. E. RICHARDSON,
Collector of Customs.

G. H. O.
L. B.

Entry No. 3392.

Custom House, Port of San Juan, Porto Rico.

MARCH 30, 1909.

I submit herewith the protest described below with the accompanying invoice and entry against my assessment of duty at 55 cents per pound on certain tobacco claimed to be dutiable as "waste, n. s. p. f.," under Par. 463, at 10% ad val. returned by the Appraiser as tobacco unmanufactured, n. s. p. f., and assessed with duty under paragraph 215 Act of July 24, 1897, in accordance with ruling——

The requirements of Section 14, Act of June 10, 1890, have been complied with by the protester.

Respectfully,
(S'g'd)

PAUL COOK,
Spec'l Deputy Collector of Customs.

To the Board of U. S. General Appraisers, New York.

9

No.	Name of importer.	Vessel.	Date of entry.
305	Geo. S. Latimer.....	Cub. S. S. "Julia"	March 16, '09

NOTE.—In transmitting protests, the requirements of Articles 1464, 1465, and 1466, Customs Regulations of 1899, should be strictly complied with. The number of inclosures should always be stated, and, in counting the same, each separate, detached paper, or group of papers (fastened together by pins, mucilage, or otherwise), should be counted as one.

Number of inclosures, 1 set.

BOARD OF UNITED STATES GENERAL APPRAISERS,
NEW YORK, *June* 9, 1909.

In the Matter of Protest 357,747 of Geo. S. Latimer Against the Assessment of Duty by the Collector of Customs at the Port of San Juan, P. R.

Before Board No. 1.

CHAMBERLAIN, General Appraiser: This protest was submitted on the record an examination of which fails to disclose any cause for disturbing the action of the collector. His decision is affirmed, the protest being overruled.

(Signed)

C. P. McCLELLAND,
R. H. CHAMBERLAIN,
Board of U. S. General Appraisers.

G. A. 6763 (T. D. 29027).

UNITED STATES GENERAL APPRAISERS,
NEW YORK, *May* 23, 1908.

In the Matter of Protests 288469, etc., of the Juan F. Portuondo Cigar Manufacturing Company Against the Assessment of Duty by the Collector of Customs at the Port of Philadelphia.

Before Board 3.

SOMERVILLE, General Appraiser: The merchandise cov-
10 ered by each of these protests consists of leaf tobacco known to the trade as scrap tobacco, and was assessed for duty under paragraph 215 of the present tariff act of 1897 as tobacco unmanufactured. Claim is made in the protests that the article is dutiable under paragraph 463 of the present tariff act at 10 per cent ad valorem as waste not specially provided for, or else under section 6 of said act as a nonenumerated unmanufactored article.

The description of the article on the invoices shows that it consists of scrap tobacco, being small pieces falling from leaf tobacco during the process of manufacture, and is of the same character as that passed on by the Board in the case of Portuondo Cigar Manufacturing Company, G. A. 4814 (T. D. 22635). Similar tobacco has been passed on by the United States Supreme Court in the case of Seeberger v. Castro (153 U. S., 32; S. C. 14 Sup. Ct. Rep., 766), and was held to be dutiable as tobacco unmanufactured not specially enumerated or provided for under the tariff act of 1883. A like ruling was made in the case of Dominguez Brothers v. United States under the present act of 1897 (122 Fed. Rep., 556). See, also, Cohn v. Spalding (24 Fed. Rep., 19). Under these decisions the protests are manifestly untenable and must be overruled.

The importers, however, request a suspension of the protests on the ground that a new suit has been commenced in the circuit court of the United States raising the same issue. The Board, after due consideration, declines to suspend the protests, for the reason that where a question of tariff law has been plainly decided by the Supreme Court the practice of the Board is to decline suspending similar cases, even though a new suit has been begun in the circuit court involving precisely the same issue, unless new evidence offered changes the phase of the original contention. There is no pretense that such is the case in reference to these protests. Note
11 Customs Regulations of 1899 (Arts. 1720-2). The merchandise, in our opinion, was properly classified as tobacco unmanufactured, not specially enumerated or provided for, and is not dutiable as waste under said paragraph 463.

The protests are overruled on all grounds and the decision of the collector affirmed in each case.

B. S. WAITE.
H. M. SOMERVILLE.
EUGENE G. HAY.
Board of U. S. General Appraisers.

Opinion.

(Filed Sept. 7, 1909.)

No. 650.

GEORGE S. LATIMER, Appellant,
v.
THE UNITED STATES, Appellee.

This is an appeal by an importer from a decision of the Board of United States General Appraisers of New York, overruling the importer's protest against a classification by the Collector of Customs at San Juan, Porto Rico. The importation was of one Bale of scrap tobacco. The Collector classified it under paragraph 215 of the Tariff Act of July 24, 1897 as "tobacco unmanufactured not specially provided for" and assessed a duty against it at the rate of fifty-five cents per pound. The paragraph referred to reads as follows:

"215. All other tobacco manufactured or unmanufactured not specially provided for in this act, fifty five cents per pound."

The importer claimed that the Collector of Customs ought to have classified this importation as "Waste," and assess duties against it under paragraph 463 of the Act which reads as follows:

"463. Waste, not specially provided for in this act, ten per centum ad valorem."

12 The only description of the merchandise imported that is given us in the record is that it was called on the invoice "One Bale of scrap tobacco," and it is further described in the letter of the Collector of Customs to the Board of General Appraisers at New York, which reads as follows:—

UNITED STATES CUSTOMS SERVICE.
PORT OF SAN JUAN, P. R., *March* 30, 1909.

The Board of U. S. General Appraisers, 641 Washington Street, New York, N. Y.

GENTLEMEN: I submit herewith the protest of Geo. S. Latimer, by Hatch and Clute, Attorneys, 100 Broadway, New York, No. 305, against the assessment of duty as made by this office on a certain bale of tobacco imported per Cuban Str. "Julia" March 16th, 1909.

Before returning said merchandise, it being understood by this office that the importation was a test one, experts of the Porto Rican American Tobacco Co., were summoned, who stated that the article under discussion was without doubt warehouse or storehouse scrap or sweepings which is even a lower grade of tobacco than factory or table scrap. They stated, however, that after cleaning it could be utilized to make a cheap grade of stogies or cigarettes, in accordance with which latter statement par. 215 "All other tobacco, manufactured or unmanufactured, not specially provided for" seems to

cover the case more specifically than par. 463, "waste, not specifically provided for."

Respectfully, D. E. RICHARDSON,
Collector of Customs.

13 Both sides have filed painstaking arguments and briefs, in which all adjudicated cases and the provisions of the different Tariff Acts that can in any manner throw any light upon the issue are fully set forth and intelligently commented on.

We have given quite careful attention to both of these arguments, and are constrained to conclude that the Collector of Customs and the Board of General Appraisers were right.

Paragraph 215 under which the Collector of Customs classified this importation is one of the paragraphs of schedule F, of the Tariff Act of 1897, which refers exclusively to tobacco, while paragraph 463 is the last paragraph, just before the free list, in what is entitled in that Act as "Miscellaneous manufactures." In our opinion therefore the "Waste" referred to in paragraph 463 is waste that cannot be classified under any of the other schedules and that is not specially provided for therein.

We think the waste referred to in this latter paragraph is waste and scraps of different commodities that could be put to some new or different use than that to which its main constituent part could ordinarily be put. In other words, the use to which the imported commodity can be put is a strong indication of the classification it ought to receive. The letter of the Collector shows that the merchandise in question after cleaning could be utilized to make a cheap grade of stogies or cigarettes. It can be seen therefore, that the importation is still tobacco, and nothing but tobacco, and the fact that it has dirt mixed with it does not change its character. The mica case referred to in appellant's brief, is not in point, because it will be seen from the tariff act of 1897 that the only provision relating to mica was fixing a duty on unmanufactured or rough trimmed mica, and on cut or trimmed mica, and therefore the scraps or dust thereof was neither the one or the other, and of course it was not specially provided for.

14 Counsel for the Government in this case contends that the ruling of the Supreme Court of the United States in the Seeberger v. Castro case, 153, U. S. 32, is controlling. Counsel for appellant contends that the issue as here raised has never been passed upon by any court, and that the point involved was not passed upon in the case referred to.

We have read the Seeberger case with some care, and think the point here at issue was passed upon, and the case for that reason is of course controlling, but independent of this, on the merits, we believe as stated, that the Collector of Customs was right. An order will therefore be entered affirming the decision of the Board of General Appraisers.

(Signed) B. S. RODEY, *Judge.*

Journal Entry.

September 7, 1909.

No. 650.

GEORGE S. LATIMER
vs.
THE UNITED STATES OF AMERICA.

This cause having been heretofore submitted upon the briefs of counsel for the respective parties, the Court on this day sends an opinion to the files containing its views, and in accordance therewith it is:

Ordered and adjudged that the action of the Collector of Customs at San Juan, Porto Rico, in assessing the customs duty under paragraph 215 of the Tariff Act of July 24, 1897, at 55 cts. per pound on the bale of scrap tobacco in controversy be, and the same hereby is confirmed and approved; and it is further:

Ordered and adjudged that the protest of the appellant George S. Latimer in and to such action of the said collector of Cus-
15 toms be, and the same hereby is overruled; and it is further

Ordered and adjudged that the action of the Board of United States General Appraisers in overruling the protest of the appellant in the premises be, and the same hereby is sustained, approved and confirmed.

Petition for Allowance of Appeal.

(Filed September 30, 1909.)

Suit No. 650.

GEORGE S. LATIMER, Appellant,
against
THE UNITED STATES OF AMERICA, Appellee.

The above-named importer-appellant, by his attorneys, hereby applies for the allowance of an appeal to the United States Supreme Court from the decision and the judgment of the United States District Court, for the District of Porto Rico, duly entered herein, and filed in the office of the Clerk of the above named court on the 7th day of September, in the year of our Lord, One thousand nine hundred and nine, for the reasons specified in the Assignments of Error, which are filed herewith, and prays that a transcript of the record, proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated the 30th day of September, 1909.

HATCH & CLUTE,
Attorneys for Importer-Appellant.

The foregoing application is granted and the appeal is allowed.
Dated the 30th day of September, 1909.

16 *Order Granting Appeal.*

(Filed September 30, 1909.)

At Chambers.

GEORGE S. LATIMER, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Comes now the above named importer-appellant, by his attorneys Messrs. Andrés B. Crosas and Hatch & Clute, and presents his petition for the allowance of an appeal to the Supreme Court of the United States from the decision and the judgment of the United States District Court for the District of Porto Rico, heretofore rendered therein and entered of record on the seventh day of September, 1909. The said appellant also presenting a cost bond in the sum of three hundred dollars ($300.00) as heretofore fixed by the Court. The Court thereupon grants the petition, allows the appeal, approves the bond in the premises, and orders that a certified transcript of the record, pleadings, and all proceedings thereunder, as may be indicated by counsel for the appellant, be forthwith transmitted to the Supreme Court of the United States as required by law.

B. S. RODEY, *Judge.*

San Juan, Porto Rico, September 30th, 1909.

Assignments of Error.

(Filed September 30, 1909.)

Suit No. 650.

GEORGE S. LATIMER, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee.

17 Now comes the above-named importer-appellant, by his attorneys, Hatch & Clute, and files the following Assignments of Error, which are intended to be urged, and upon which he will rely on his appeal herein to the Supreme Court of the United States from the judgment and decree of the above-named Court, duly entered herein, and filed in the Office of the Clerk of said Court on the 7th day of September, 1909.

I. The United States District Court, for the District of Porto Rico, erred in sustaining the decision of the Board of United States General Appraisers herein, and in not reversing the same, and sustaining the protest of the importer.

II. The said Court erred in not finding that the merchandise covered by this suit is "waste."

III. The said Court erred in not holding that the merchandise covered by this suit is more appropriately and more specifically provided for as "waste" under paragraph 463 of the Tariff Act of July 24, 1897 than under paragraph 215 of said Act as "tobacco unmanufactured."

IV. The said Court erred in not adjudging and decreeing that the said merchandise is dutiable at ten per centum ad valorem as "waste" under said paragraph 463 of said Act.

Dated September 30, 1909.

GEORGE S. LATIMER,
By HATCH & CLOUTE,
Attorneys for Importer-Appellant, #100 Broadway, Borough of Manhattan, New York City, N. Y.

18 *Appeal Bond.*

(Filed September 30, 1909.)

GEORGE S. LATIMER, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Know all men by these presents, that we, George S. Latimer, of San Juan, Porto Rico, as principal, and the Fidelity and Deposit Company of Maryland, a corporation duly organized under the laws of Maryland and doing business in Porto Rico, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars ($300.00) to be paid to said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of September, in the year of our Lord, nineteen hundred and nine.

Whereas, lately, at a session of the United States District Court for Porto Rico, in the appeal pending in the said Court from a decision of the Board of General Appraisers between the said George S. Latimer and the United States, a decree was rendered against the said George S. Latimer, and the said George S. Latimer has obtained from said Court an order allowing an appeal to the United States Supreme Court to reverse the decree of the aforesaid suit.

Now, the condition of the said obligation is such that if the said George S. Latimer shall prosecute his said appeal to effect and shall answer all damages and costs that may be awarded against
19 him, if he fails to make his appeal good, then the above obligation is to be void, otherwise to remain in full force and effect.

GEO. S. LATIMER, *Principal.*
FIDELITY AND DEPOSIT CO. OF MARYLAND, *Surety.*
By F. H. WELTY, *Agent.*

[Seal of Fidelity and Deposit Company of Maryland.]

ISLAND OF PORTO RICO,
City of San Juan, ss:

On this date appeared before me Frank M. Welty of San Juan, Porto Rico, and being duly sworn deposes and says: that he is the duly authorized agent in Porto Rico for the Fidelity and Deposit Company of Maryland, and that he has executed the above bond as representative of the said Company and that the same is his free and voluntary act as such agent. And I the Notary certify that I know personally the said Frank M. Welty, a resident of San Juan, Porto Rico, banker, and 34 years old.

San Juan, P. R. September 29th, 1909.

[NOTARIAL SEAL.] ANDRÉS B. CROSAS.

Reg'd a*l* No. 339.

Approved 9/30/09.
B. S. RODEY, *Judge.*

20 In the District Court of the United States for Porto Rico.

No. 650.

GEORGE S. LATIMER, Appellant,
vs.
THE UNITED STATES, Appellee.

I, John L. Gay, Clerk of the District Court of the United States, in and for the District of Porto Rico, do hereby certify the foregoing nineteen typewritten pages, numbered from 1 to 19, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this thirteenth day of October, A. D. 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk Dist. Court of U. S. for P. R.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to appear before the Supreme Court of the United States, at the City of Washington, in the District of Columbia, on the 28th day of November next, pursuant to an appeal duly allowed by the United States District Court, for the District of Porto Rico, filed in the Clerk's Office of said Court on the 7th day of September, 1909, wherein George S. Latimer, is Appel-

lant, and you are Appellee, to show cause, if any there be, why the decree rendered against said Appellant in said appeal mentioned, should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of San Juan, Porto Rico, in the District above named, this 30th day of September, in the year of our Lord, One thousand nine hundred and nine.

B. S. RODEY,
Judge of the District Court of the United States for the District of Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

Attest:

JOHN L. GAY,
Clerk Dist. Court of U. S. for P. R.

Service of the above citation acknowledged this eleventh day of October, 1909.

J. R. F. SAVAGE,
United States Attorney,
By FRANK ANTONSANTI.

22 [Endorsed:] No. 650. Equity. United States Supreme Court. Suit No. 650. Eq. George S. Latimer, Appellant, against The United States of America, Appellee. Original. Citation. Hatch & Clute, Att'ys for Appellant, 100 Broadway, N. Y. City. Filed Clerk's Office, United States District Court, October 11, 1909. John L. Gay, Clerk of the Court, By C. A. Davidson, Deputy.

Endorsed on cover: File No. 21,875. Porto Rico D. C. U. S. Term No. 151. George S. Latimer, appellant, vs. The United States. Filed October 21st, 1909. File No. 21,875.

In the Supreme Court of the United States.

October Term, 1911.

No. 151.

Office Supreme Court, U. S.
FILED.
DEC 16 1911
JAMES H. McKENNEY
CLERK

GEORGE S. LATIMER,
Appellant,

against

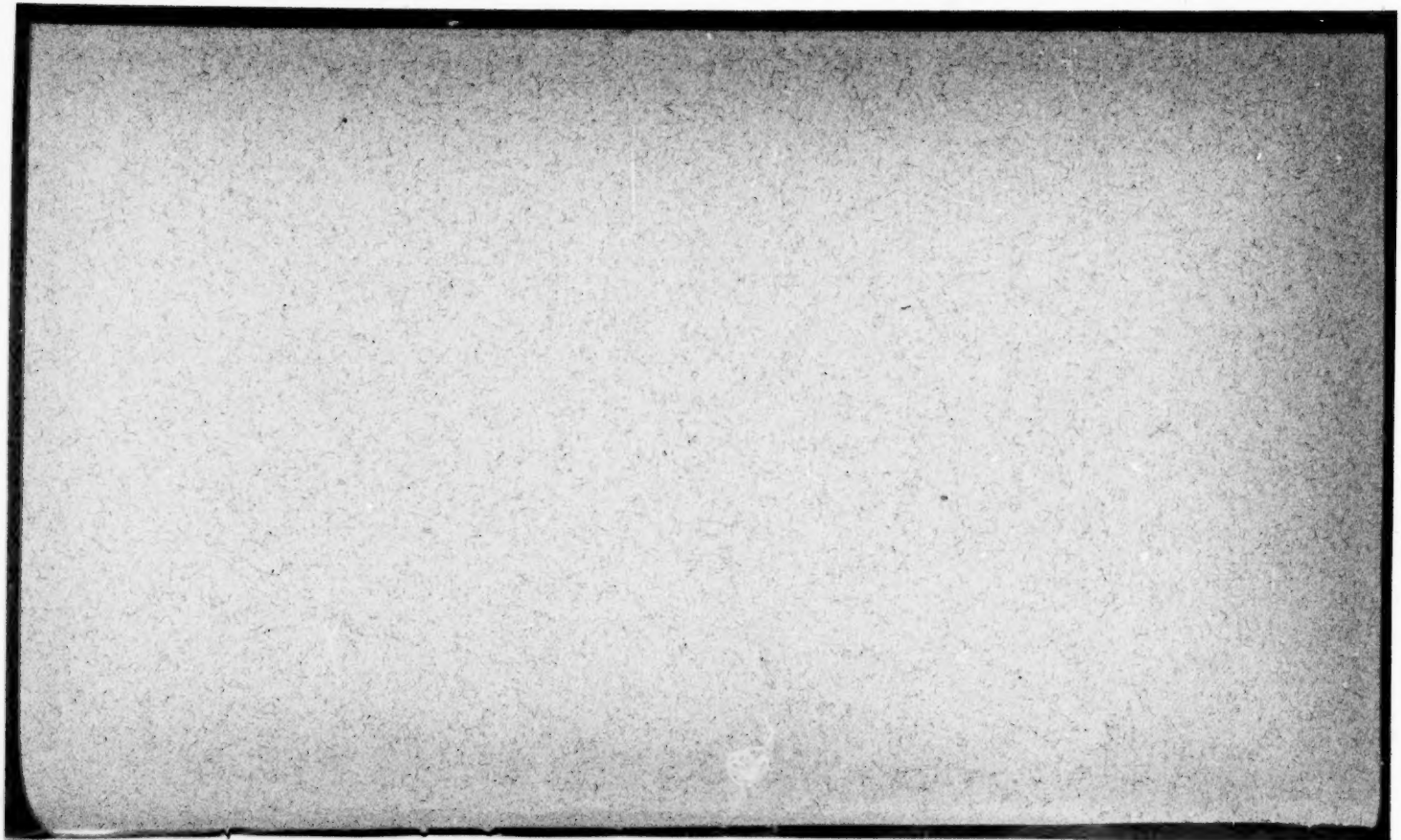
THE UNITED STATES,
Appellees.

BRIEF FOR APPELLANT.

HATCH & CLUTE,
Attorneys for Appellant,
100 Broadway,
New York, N. Y.

EDWARD S. HATCH,
WALTER F. WELCH,
Of Counsel.

APPEAL PRINTING COMPANY, NEW YORK.



Supreme Court of the United States.

No. 151.

October Term, 1911.

GEORGE S. LATIMER,
APPELLANT,

against

THE UNITED STATES,
APPELLEES.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from the decision of the United States District Court, for the District of Porto Rico, sustaining the decision of the Board of United States General Appraisers at New York, overruling the importer's protest against a classification by the Collector of Customs at San Juan, Porto Rico.

The merchandise as imported was the scrap or sweepings from a tobacco warehouse or storehouse. After cleaning it could be utilized to make a cheap grade of stogies or cigarettes (Record, p. 5).

The Collector of Customs at San Juan assessed these sweepings for duty at the rate of 55 cents

per pound under paragraph 215 of the Tariff Act of July 24, 1897, which reads as follows:

> "All other tobacco, manufactured or unmanufactured, not specially provided for in this Act, fifty-five cents per pound" (Record, p. 5).

The appellant duly protested claiming that the merchandise was properly dutiable at ten per cent. ad valorem under paragraph 463 of said Act, which reads as follows:

> "Waste, not specially provided for in this Act, ten per cent. ad valorem."

The question now before this Court, therefore, is whether the merchandise in its condition as imported is properly classifiable under the paragraph providing for unmanufactured tobacco or under the paragraph providing for waste.

POINT I.

The merchandise involved in this suit is waste.

While the Court below practically admits that the merchandise in suit is "waste," it may be well first to show its exact nature and that this merchandise is properly waste within the meaning of the tariff.

It consisted of the usual floor refuse of a tobacco warehouse. The Collector in his letter to the Board of United States General Appraisers transmitting the protests reports that experts called for the purpose declared that the article "was without doubt warehouse or storehouse scraps or sweepings, which is even a lower grade than factory or table scrap" (Record, p. 5 and sample). It is so poor

a grade that it is worth only sixteen cents a pound as the invoice shows.

That such scrap or sweepings is waste is shown in the case of United States *v.* Schroeder, 93 F. R., 448, where the Court in detail describes a higher grade of scraps and declares it to be waste. The Court said page 449:

> "'Scrap tobacco,' however (the trade-name of the article here imported), constitutes a class of its own; coming to this country in bales of a peculiar size, differing from those of wrapper or filler tobacco.
>
> It is the part that falls when stripping the tobacco to prepare the leaf to go into the cigar. In the process of manufacturing cigars, they take tobacco in the leaf, put it first on racks to dry, then in barrels to sweat, and then put it on the cigar maker's table. In all this handling, racking, barreling, taking out and putting on the table,—there is always more or less breakage of the tobacco leaf, and the particles which fall in handling, and those which are broken from the leaf in the process of stemming, make this scrap tobacco. They drop to the floor, and are swept up. It is worth about one quarter of the value of the tobacco leaf from which it comes. The breaking is not intentional. In the rough handling of the leaf in tearing off the stem, pieces fall to the floor, which the workman does not stop to pick up, but which are subsequently collected from the floor as scraps. It is principally used for cigarettes and the cheaper grades for cigars, the cheapest grade of Havana filler cigar,—and can only be used for fillers. The term 'leaf tobacco,' in the trade, is applied to anything that is on the stem or in its original form with the stem taken out. These filler scraps seem not to be within the ordinary meaning of the phrase

> 'tobacco leaf' and there is nothing to indicate that trade usage so classifies them. They are therefore not covered by any of the paragraphs of the tobacco schedule, but may fairly be classified as waste, spoiled, superfluous, or rejected material, which is of the same kind as the material utilized for the intended purpose. Standard Varnish Works *v.* U. S., 8 C. C. A., 178, 59 Fed., 456; U. S. *v.* Dean Linseed Oil Co., 31 C. C. A., 51, 87 Fed., 453."

When this superior grade of scrap tobacco is thus declared to be waste, then the inferior "warehouse or storehouse scrap or sweepings" fit only after cleaning "to make a cheap grade of stogies or cigarettes," is within the definition of tobacco waste.

It is a rule of law that merchandise is classifiable for the purposes of duty in its condition as imported,

> Worthington *v.* Robbins, 139 U. S., 337.
> Dwight *v.* Merritt, 140 U. S., at p. 219.
> U. S. *v.* Schoverling, 146 U. S., at p. 82,

therefore it is not a material fact to the classification of this merchandise that there are recoverable portions of it suitable, when recovered, for making cheap stogies. All waste has a value through the recovery from it of more or less valuable constituents. A levy of ten per cent. ad valorem on waste under the Tariff Act pre-supposes that waste materials are valuable. Hence we respectfully submit the fact reported by the Collector that after importation the sweepings can be cleaned and the recovered portion put to a valuable use ought to have no weight in determining its classification, but that the merchandise should

be considered in its condition as passed through the Custom House.

> "All the various questions of utility and "adaptation of the merchandise imported are "not supposed to enter into the decision of the "Collector in determining its dutiable classi- "fication, under the rule in Worthington *v.* "Robbins."
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> Dwight v. Merritt, 140 U. S., 213, at p. 219.

POINT II.

Whether this waste is properly classifiable as waste or as tobacco unmanufactured has never been authoritatively decided.

In the opinion rendered by the Court below the case of *Seeberger* v. *Castro*, 153 U. S., 32, was alone relied upon. The Court held that that case was controlling (Record, p. 9). The view of the United States District Court was based on the assumption that this Court in that case decided that a provision in the Tariff providing for unmanufactured tobacco is more specific than a provision for waste.

The appellant, however, submits that the Court below was in error in considering itself bound by the case of Seeberger *v.* Castro, 153 U. S., 32. That case, it is submitted, did not decide that a tariff provision for unmanufactured tobacco is more specific than a provision for waste.

In the first place it is to be noted that there was no appearance for the importer in that case. We have examined the record on appeal on file in the Clerk's office in this court, and have likewise examined the brief for the United States filed therein.

At page 10 of the record in the Special Findings of the Circuit Court, it appears that the tobacco there in question consisted of

> "Clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured * * * not fit for any use in the condition in which the same are imported and that their only use is to be manufactured into cigarettes and smoking tobacco."

The only claim made by the importer and hence the only one which could be considered at any stage of the proceedings (U. S. *v.* Baversdorfer, 126 F. R., 732) is found by the Circuit Court as follows:

> "That in such protest and appeal the plaintiff claims said merchandise should be assessed a duty of thirty per cent. ad valorem as unmanufactured tobacco under Schedule F, Section 2502, Act of March 3, 1883."

In the bill of exceptions at page 11 of the record the first exception made by the defendant is the formal one that the plaintiff could not maintain his action, so that the only substantial and specific exception was the second exception, showing the real issue before this Court in the decision of that case as follows:

> "And thereupon the Court further held as a matter of law upon the facts hereinbefore set forth that the said goods involved in this suit were not a manufacture of tobacco, within the meaning of the Tariff Act. To which said findings as to the law by the Court the defendant by his Counsel then and there duly excepted * * *."

It appears, therefore, from the record and brief, that no claim was made in the pleadings, and no is-

sue was raised, and no reference was made to the question whether a provision for "waste" in the Tariff Act is a more specific provision for waste tobacco than a provision in the same act for unmanufactured tobacco. All that this court decided in the Seeberger case, *supra*, was that the clippings from the ends of cigars and pieces broken from tobacco of which cigars are manufactured were not manufactured tobacco, and affirmed the judgment below. It is obvious under the issues that this Court could come to no other conclusion. Hence we respectfully submit that the Seeberger case is not an authority on the issue now here for determination and that that case is not binding in deciding this case.

This court has spoken very clearly and pertinently to the case at bar on the question of binding authority in *U. S.* v. *Bank of U. S.*, 5 How. 382, at page 395:

> "The instruction given cut off every other question the government might have raised in opposition to the set-off claimed; and as this court, when acting as a court of errors, can only legitimately revise the questions of law that have been raised and decided in the circuit courts, it must of necessity, on a second writ of error being prosecuted, have power to revise such rulings of the court below on the second trial as affect the merits of the controversy, and *to pass on the questions not previously presented, as open questions, in the particular cause.* However high the regard of judges that did not concur may be for the views entertained and expressed by other judges, *on a question of law not brought up for decision, still it is impossible to recognize such views as binding authority, consistently with the due administration of justice: as by doing*

so the merits of the controversy might be forestalled, without proper examination."

We submit the doctrine just quoted is clearly applicable to this case, and that inasmuch as the present case involves a question of law not brought up for decision in Seeberger *v.* Castro, it is impossible to recognize Seeberger *v.* Castro as binding authority in this particular cause, and to do so would forestall the merits of the present controversy without proper examination.

This court does not review, upon a writ of error, errors of law which do not appear of record or by bill of exceptions. *Claasen* v. *U. S.*, 142 U. S., 140. Therefore there was no application of the judicial mind to the question presented in this case in the case of Seeberger *v.* Castro. The appellant in the present case is consequently not foreclosed by the decision of this Court in that case.

In Kreshower v. U. S., T. D. 27826, certain preserved cycas palm leaves were assessed under paragraph 425 of the Act of 1897. They were claimed to be dutiable under paragraph 449. The importer relied on the cases of G. W. Sheldon & Co. *v.* U. S., T. D. 26101 and T. D. 26462, wherein the Circuit Court had held palm leaves chemically treated dutiable under paragraph 449. But the court refused to recognize the Sheldon cases as controlling because the question whether paragraph 425 was applicable was not presented or considered in those cases, and in the case then before the court, where the issue was presented the court held paragraph 425 controlling.

In the case of *Sears-Roebuck & Co.* vs. *United States*, T. D. 32055, the Court of Customs Appeals says:

> "In the case of Sheldon *v.* United States (T. D. 31657) this court held that such hair clip-

pers as those in question are not 'shears,' but are manufactures of steel not specially provided for, and therefore properly assessable under paragraph 199 of the Tariff Act of 1909. In that case the question made by the importer's protest was whether or not such clippers were 'shears,' and the contention presented by the appellants in this case that such articles are machine tools was not made in the case. Therefore that decision is not conclusive of the present issue."

These cases show that a decided case, holding goods dutiable under a particular paragraph of a Tariff Act, is not binding in a later case which raises an issue as to the applicability of a paragraph not drawn to the attention of the Court nor discussed in the decided case relied on.

While the Seeberger case, *supra*, was the only one relied upon by the Court below, it is possible that upon this appeal the case of U. S. *v.* Schroeder, 93 Fed. Rep., 448, may be referred to as an authority in support of the position of the appellee. The question there involved was the proper classification of tobacco similar to that in this case under the Act of 1890 where paragraph 243 provided for leaf tobacco and paragraph 472 for "waste, not otherwise provided for," there being no provision for unmanufactured tobacco as under the act of 1897. The Court held that the tobacco should have been assessed for duty as "waste." In commenting on the various provisions for tobacco in the different Tariff Acts, the Court remarked that the provision in the act of 1883 for "tobacco unmanufactured, not specially enumerated or provided for," omitted in the act of 1890 seemed to cover the merchandise in question. It should be noted that the provision above in the act of 1883 contains the

word "enumerated," omitted in the act of 1897, which makes the former provision wider in scope. However, the comment of the Court is clearly a dictum outside of the issue and not an authority on the question here involved.

In the record of the case now before the Court is a copy of T. D. 29027 transmitted with the decision of the Board of United States General Appraisers (fols. 9, 10 and 11). Turning to that case it is observed that the cases therein relied upon, besides the *Seeberger* case, *supra*, are *Dominguez Brothers* v. *United States*, 122 Fed. Rep., 556 and *Cohn* v. *Spalding*, 24 Fed. Rep., 19, not even cited, however, by the Court below. As to the latter of these two cases it is sufficient to say the Court itself declared that "the only question in the case is whether this is manufactured or unmanufactured tobacco." In the former case the only issue was whether the merchandise should have been assessed as leaf tobacco under paragraph 214 of the act of 1897 or as "all other tobacco, manufactured or unmanufactured not specially provided for." Since no claim was made under the paragraph for "waste," the case is not in point.

It is plain, therefore, and we respectfully submit, that no decision is to be found on the issue raised in this case, and that no such issue has ever been presented to any court for decision, and that just the thing will happen in this case which this Court suggested in the quotation from U. S. *v.* Bank of U. S., *supra*, namely, that the question of law here involved will be forestalled without proper examination, by assuming Seeberger *v.* Castro to be controlling, where the question here was not brought up for decision by the record in that case,

mentioned in the brief filed, discussed by this Court, nor in any way considered so far as the records of that case disclose.

POINT III.

The merchandise is more specifically provided for as "waste" than as "tobacco unmanufactured."

We respectfully submit that the issue stated in this point has never been decided by any Court previous to the decision of the Court below herein. Under the circumstances, therefore, the question is open whether these tobacco sweepings are more appropriately classifiable and dutiable as "waste" than as "tobacco unmanufactured."

In *Brennan* v. *United States,* 136 Fed. Rep., 743, it was held that in the case of limes in brine the provision for "fruits in brine" was more specific than the provision for "limes," the Court saying, at page 746:

> "Such decisions tend more or less to sustain the proposition that, notwithstanding an article may be literally included within a designation *eo nomine* contained in a certain paragraph of the customs laws, yet on account of its relations to a peculiar class, it should be referred to some other paragraph. Therefore it is that sometimes the ordinary rule that articles are not dutiable under general terms when a duty is imposed in specific language leaves it to be determined what is specific language, and whether it is that which contains a designation *eo nomine* or that which describes a class. Evidently, language referring to the latter may be, under some circumstances, the more specific; and such apparently is the case at bar."

In the same way in *U. S.* v. *Reiss,* 136 Fed. Rep., 741, it was held that a provision for "fruits preserved" was a more specific provision for figs preserved than a specific provision for "figs." In other words, the principle of these cases is that words which at first blush seem to describe a class, are in truth on examination found to be more specific than apparently *eo nomine* provisions. So, we respectfully submit, that principle is applicable to the present case. And in the case of all waste materials, as a well-known and clearly defined class in commerce, made up of all kinds of refuse of various materials, it seems clear, that when any material is waste, the provision for it as waste in the Tariff Act is more appropriate and more specific than a provision in the same act for material generically the same but raw or unmanufactured.

In *Nairn Linoleum Co., U. S., 142 Fed., 214,* certain refuse of cork bark was held to be dutiable as waste, and not as cork wood, or cork bark unmanufactured.

In *T. D. 16324, G. A. 3153,* it was held that certain marble chips were dutiable as waste, and not free as minerals crude, and not advanced in value or condition by refining or grinding or other process of manufacture.

In *T. D. 23347, G. A. 5017,* it was decided that certain short ramie fibers, produced and accumulated in the process of combing ramie, were dutiable as waste, and not free of duty as textile grasses not dressed or manufactured.

In *T. D. 23637, G. A. 5115,* it was held that certain jute waste was dutiable as waste, and not as jute not dressed or manufactured in any manner.

In *T. D. 28050, abstract 14869,* it was decided

that mica waste is dutiable as waste, and not as mica, unmanufactured, or rough trimmed only. We maintain this case is not distinguishable from the present case.

In *T. D. 31739, G. A. 7242*, it was held that jute card waste, which is a by-product produced in the process of manufacturing jute by rejection from cards or combing machines, is dutiable as waste, and not as jute not dressed or manufactured in any manner. This case also we submit is not distinguishable from the present case.

The Board of United States General Appraisers in the case of jute waste, just cited, made the following statement:

> "The testimony shows that jute card waste is a species of waste produced in the process of carding or combing jute, being the inferior part of the jute rejected by the combs or cards. The contention of the importers reduces itself to this proposition, that although the article in question consists of jute card waste and is a waste, it nevertheless must be considered as jute, because it is not dressed or manufactured in any manner, and therefor free of duty under one or the other of the paragraphs of the tariff acts referred to. The tariff act specially makes provision for various kinds of waste products which have been uniformly held subject to duty as waste not otherwise provided for, being generally a by-product produced in the process of manufacture. No one has ever successfully contended that these products cease to be of the same material as the merchandise from which they were produced. For example, in the Standard Varnish Works *v.* United States (59 Fed. Rep., 456), where the word 'waste' as used in tariff acts is defined, waste rope and waste bagging were said to be 'no new creation, but the same in substance as bagging of

> rope,' though unfitted for the purpose for which bagging and rope are intended generally. So with old gunny bagging assessed as waste under paragraph 463 of the tariff act of 1897. Train-Smith *v.* United States (107 Fed. Rep., 261), affirming, G. A. 4406 (T. D. 20960); *In re* Oberle & Henry, G. A. 7194 (T. D. 31447). It is manifest that cotton waste, which is free of duty, would not cease to be the material of cotton. So, rubber waste would continue to be rubber, and a like principle applies to all other articles known as waste."

We respectfully submit this argument is precisely applicable to tobacco waste. It is an article of commerce having qualities and attributes which distinguish it and make it a thing apart from the raw or unmanufactured material from which it is produced.

It is to be observed that in all the cases cited, where the provision for waste was held to be controlling over provisions for the raw or unmanufactured material from whence the waste came, that the unmanufactured material was free of duty; whereas, the provision for waste prescribes a duty of ten per cent. ad valorem. In none of these cases did the Board of United States General Appraisers find any difficulty in assessing duty upon the waste, notwithstanding the unmanufactured material was free. In the present case the duty on the unmanufactured raw material is much higher than the duty on waste, but that is no reason for assessing the higher duty, and the rule ought to be consistently applied, irrespective of the result. Good clean leaf tobacco, unstemmed, is only dutiable at thirty-five cents a pound under the Act of 1897, and yet the Col-

lector has assumed to assess fifty-five cents a pound on this refuse material, including the weight of the stems, dirt and dust, which admittedly are not tobacco unmanufactured. It is the mixture of these materials with the broken pieces of tobacco which characterizes this material as waste, from which usable pieces of tobacco leaf can be culled by cleaning (Record, p. 5).

We submit that the rule applied by the Board in the case of cork bark waste, marble waste, ramie waste, jute waste and mica waste, should be applied equally to tobacco waste.

POINT IV.

The rules of construction tend to resolve this question favorably to the importer.

While we respectfully insist that it has been so far demonstrated that the merchandise should be assessed as waste, yet even if the proper classification should be deemed doubtful, it is well established that all doubtful questions must be resolved favorably to the importer. The rule is thus stated in *Hartranft* v. *Wiegman*, 121 U. S., 609, 616:

> "We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations. Powers *v.* Barney, 5 Blatchford, 202; U. S. *v.* Isham, 17 Wall, 496, 504; Gurr *v.* Scudds, 11 Exch., 190, 191; Adams *v.* Bancroft, 3 Summer, 384."

Then too, in case of uncertainty in the application of two conflicting provisions of the same act it is held that the last provision should prevail,

as is laid down in *Powers* v. *Barney*, 5 Blatch., 202:

> "In this difficulty of conflicting claims I know of no other way of solving, than by applying the well settled rule of construction, in the case of two repugnant provisions in the same act, which is, that the last provision shall prevail, as speaking the latest and final intent of the law makers."

Furthermore, to hold that this waste was properly assessed for duty as unmanufactured tobacco, would amount to construing the provision to mean that the intention of Congress was to prohibit the importation of merchandise of this kind. The evidence shows that this kind of waste is only worth sixteen cents per pound and if a duty of 55 cents should be imposed, it would be equivalent to an ad valorem duty of 340% which is unfair and unconscionable and such a prohibitive duty could not have been contemplated by Congress according to the principle stated in *Shallus* v. *U. S.*, 162 Fed., 653, where the question was as to whether certain small tin discs produced in making tin cans should be assessed at 12½ cents per pound as tin plate. Said the Court at page 655:

> "If, therefore, these disks are charged with the 1½ cents per pound duty required to be assessed against commercial plates, they must pay near 200 per cent. ad valorem, while the commercial plates would pay about fifty per cent. ad valorem.
>
> The proposition that a part of the whole containing the exact substance and only charged in form and size by which its value is so greatly depreciated, should be so discriminated against, is so manifestly unjust and unconscionable as to be avoided if possible.

Such discrimination makes, as shown by the evidence, the importation of these disks prohibitive. Did Congress design this? We think not."

POINT V.

The judgment of the Court below should be reversed and the protest sustained.

Dated December 16, 1911.

Respectfully submitted,
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